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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MARRIAGE OF:	)	
	)	
HUGO M. GALICIA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 53A01-0610-CV-460
	)	
SHERRY ANN BABBS,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable E. Michael Hoff, Judge
Cause No. 53C01-0504-DR-243

May 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Hugo M. Galicia appeals the trial court's order granting custody of J.G. to her mother, Sherry Ann Babbs. Galicia argues the trial court used an improper standard in its custody determination and incorrectly treated this case as an initial determination of custody rather than a modification of custody. Concluding the trial court applied the proper standard for determining custody when there is a de facto custodian, and properly treated this as an initial determination of custody, we affirm.

Facts and Procedural History

Galicia and Babbs met in 2001. Both parties concede the relationship was characterized by some violence, which resulted in Galicia's arrests for domestic battery. J.G. was born September 16, 2002, and Galicia signed a paternity affidavit at the hospital, believing himself to be her father. Babbs and Galicia were married on October 15, 2002.

On December 28, 2002, after a Bloomington police officer observed Babbs and Galicia in an altercation while Babbs' two daughters[1] were present, Babbs and Galicia were both arrested. The two children were taken into custody by the Monroe County Department of Child Services ("DCS") and placed in foster care. Babbs exercised regular visits until mid-January of 2003, when she moved to Boston.

J.G. was found to be a child in need of services ("CHINS") on April 28, 2003. Babbs did not appear for the fact finding hearing. Galicia appeared for the fact finding hearing and entered an admission to the petition. He was believed to be J.G.'s father. The CHINS order

[1]Besides J.G., Babbs has another daughter, A.B., born September 20, 2001. Babbs' parental rights with respect to A.B. were terminated by an order entered in the Monroe Circuit Court. Appellant's

provided J.G. would be returned to the custody of Galicia after the DCS completed a parenting analysis. Galicia received services to improve his parenting skills and J.G. was returned to his care on September 6, 2003. The CHINS case was closed on December 8, 2003. J.G. has lived in Galicia's home since September of 2003.

Babbs returned from Boston in the summer of 2003. Galicia allowed J.G. to see Babbs in March of 2004. Babbs did not see J.G. again until March of 2005.

In March of 2005, Babbs and Galicia reestablished contact. Galicia left J.G. with Babbs for two weeks, after which, Babbs alleged, Galicia came into her home and battered her. As a result, Galicia was charged with domestic battery. On April 1, 2005, Babbs filed a petition for protective order. After a hearing, the court ordered that Galicia have custody of J.G. and that Babbs have supervised visitation for two hours per week. No protective order was entered.

On April 29, 2005, Babbs filed her "Verified Petition for Dissolution of Marriage and Emergency Modification of Child Custody" in this case. She also requested paternity testing. The paternity test report showed that Galicia is not J.G.'s biological father.

In May, Babbs was seriously injured in an automobile accident and subsequently received $750,000 in a settlement.

On June 29, 2006, the trial court entered its Decree of Dissolution of Marriage, granting Babbs custody of J.G. Galicia now appeals.

Discussion and Decision

I. Standard of Review

App. at 19. A.B. is not involved in this case.

Babbs requested findings of fact and conclusions thereon. In reviewing findings made pursuant to Indiana Trial Rule 52(A), we first determine whether the evidence supports the findings and then whether the findings support the judgment. In re Paternity of Z.T.H., 839 N.E.2d 246, 248 (Ind. Ct. App. 2005). On appeal, we may "not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A).

A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment. Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005). A judgment is also clearly erroneous when the trial court applies the wrong legal standard to properly found facts. Id. "While findings of fact are reviewed under the clearly erroneous standard, appellate courts do not defer to conclusions of law, which are reviewed de novo." Id. In cases where mixed issues of fact and law are presented we have described the standard of review as an abuse of discretion. Id. A finding or conclusion is clearly erroneous when a review of the evidence leaves us with the firm conviction that a mistake has been made. Id.

We observe that a child custody determination falls within the sound discretion of the trial court and such determination will not be disturbed on appeal absent an abuse of discretion. Matter of Guardianship of R.B., 619 N.E.2d 952, 955 (Ind. Ct. App. 1993). We are reluctant to reverse a decision concerning child custody unless the determination is clearly erroneous and contrary to the logic and effect of the evidence. Id.

II. Legal Standard Applied To De Facto Custodian

It is undisputed, as noted by the trial court, that Galicia has been J.G.'s de facto

custodian since September of 2003. Appellant's App. at 21. A de facto custodian is defined as:

> a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least:
>
> (1) six (6) months if the child is less than three (3) years of age; or
> (2) one (1) year if the child is at least three (3) years of age.

Ind. Code § 31-9-2-35.5. Where a party meets this definition of a de facto custodian, he has standing to pursue custody of a child and must be made a party to the dissolution action. Ind. Code § 31-17-2-8.5(c).

In a dissolution of marriage action, the court determines custody in accordance with the best interests of the child. As between the parties, Indiana Code section 31-17-2-8 provides:

> In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:
>
> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parent or parents;
> (B) the child's sibling; and
> (C) any other person who may significantly affect the child's best interests.
> (5) The child's adjustment to the child's:
> (A) home;
> (B) school; and
> (C) community.
> (6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.
(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

In addition to these "best interests" of the child factors, once a court determines a de facto custodian exists and that individual has been made a party to a custody proceeding in a dissolution action, the court shall consider the following factors in determining the child's "best interests":

(1) The wishes of the child's de facto custodian.
(2) The extent to which the child has been cared for, nurtured, and supported by the de facto custodian.
(3) The intent of the child's parent in placing the child with the de facto custodian.
(4) The circumstances under which the child was allowed to remain in the custody of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent seeking custody to:
    (A) seek employment;
    (B) work; or
    (C) attend school.

Ind. Code § 31-17-2-8.5(b). "The court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child." Ind. Code § 31-17-2-8.5(d).

The intent of the "de facto custodian" amendments is "to clarify that a third party may have standing in certain custody proceedings, and that it may be in a child's best interests to be placed in that party's custody." In Re Guardianship of L.L., 745 N.E.2d 222, 230 (Ind. Ct. App. 2001), trans. denied. However, "[t]he presumption in favor of natural parents prevails." Id.

When a custody determination is to be made between a natural parent and a third

party, the court presumes that the natural parent has a superior right to custody and the nonparent-third party seeking custody bears the burden of overcoming this presumption. Id. We have articulated the following standard:

> First, there is a presumption in all cases that the natural parent should have custody of his or her child. The third party bears the burden of overcoming this presumption by clear and cogent evidence. Evidence sufficient to rebut the presumption may, but need not necessarily, consist of the parent's present unfitness, or past abandonment of the child such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. However, a general finding that it would be in the child's "best interest" to be placed in the third party's custody is not sufficient to rebut the presumption. If the presumption is rebutted, then the court engages in a general "best interests" analysis. . . .
>
> If a decision to leave or place custody of a child in a third party, rather than a parent, is to be based solely upon the child's 'best interests,' as opposed to a finding of parental unfitness, abandonment, or other wrongdoing, such interest should be specifically delineated, as well as be compelling and in the "real and permanent interests" of the child.

Id. at 230-31 (citation and emphasis omitted).

Applying this rule to the present case, it is presumed that it was in J.G.'s best interests to be placed in the custody of her mother. Galicia, as de facto custodian, had the burden to overcome that presumption by clear and convincing evidence.

Here, the trial court properly noted that it is required by statute to consider evidence that a child has been cared for by a de facto custodian. Appellant's App. at 21-22. The court then recited the following standard to follow when deciding whether a child should be placed with a person other than a parent:

> To resolve the dispute in the caselaw regarding the nature and quantum of evidence required to overcome this presumption [that the child's best interests are ordinarily served by placement in the custody of the natural parent], we hold that, before placing a child in the custody of a person other than the

> natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. The presumption will not be overcome merely because "a third party could provide the better things in life for the child." Hendrickson, 161 Ind.App. at 396, 316 N.E.2d at 381. In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third person, would of course be important, but the trial court is not limited to these criteria. The issue is not merely the "fault" of the natural parent. Rather, it is whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child's best interests are substantially and significantly served by placement with another person. In re B.H., 770 N.E.2d 283, 287 (Ind. 2002)

Id. at 22. Thus, the trial court properly noted that before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement.

Galicia argues that as a de facto custodian, he can rebut the presumption in favor of the natural parent by showing that (1) the natural parent was unfit, (2) the natural parent acquiesced in the custody of the de facto custodian, or (3) a strong emotional bond has arisen between the de facto custodian and the child. He asserts that if he establishes any of these factors, then "the third party and the parent are on a level playing field, and the parent seeking to modify custody must establish the statutory requirements for modification by showing that modification is in the child's best interests and that there has been a substantial change in one or more enumerated factors." Z.T.H., 839 N.E.2d at 252-53. Galicia asserts he satisfied all three factors: that Babbs is unfit, that she acquiesced in his care of J.G., and that a strong emotional bond has formed between J.G. and Galicia. Thus, he asserts he has

effectively rebutted the parental presumption in favor of Babbs.

In Z.T.H., the child's biological father filed a petition to modify custody approximately ten years after the child's maternal grandparents had been awarded custody pursuant to an agreement between the father, mother and grandparents. The trial court granted the petition and awarded the father custody. This court reversed on appeal, stating that when a parent seeks to modify the long-term permanent custody of a third party, the third party must rebut the parental presumption with evidence establishing the natural parent's unfitness or acquiescence, or demonstrating that a strong emotional bond has formed between the child and the third party. Id. at 252 (citing B.H., 770 N.E.2d at 287).

> If the third party is able to rebut the parental presumption with clear and convincing evidence, the third party is essentially in the same position as any custodial parent objecting to the modification of custody.

839 N.E.2d at 252-53. Thus, the court differentiated the legal analysis to be applied in cases involving initial custody placements with a third party from cases involving the modification of an existing third party custody arrangement. 839 N.E.2d at 253. The court found that "[h]aving found that [father] acquiesced to the [grandparents'] custody of [the child], the trial court's conclusion that the [grandparents] failed to rebut the parental presumption is clearly erroneous." 839 N.E.2d at 257. Because the grandparents rebutted the parental presumption, the court remanded for a hearing in which father had the burden of establishing that the modification of custody is proper. Id.

Galicia's reliance on Z.T.H. is misplaced. That case involved an agreement giving the grandparents custody of the child. The agreement provided for visitation, support, medical and dental insurance obligations with regard to the child. This is different from the orders

under which Galicia had care of J.G. because these orders were based on the presumption that he was her natural father. Further, in Z.T.H., the grandparents were permanent legal custodians for almost ten years pursuant to the custody agreement to which the parent was a party. Z.T.H. clearly did not involve an initial placement of a child outside of the parent's custody. Thus, the two-step approach Galicia now advocates is not proper for the determination of custody in this case.

There is a presumption that the natural parent should have custody of his or her child. Guardianship of L.L., 745 N.E.2d at 230. The presumption can only be overcome by clear and convincing evidence that the child's best interests would be substantially and significantly served by placement with another person, pursuant to In re B.H., 770 N.E.2d 283. The third party has the burden of overcoming this presumption. Guardianship of L.L., 745 N.E.2d at 230. The three criteria Galicia cites are merely factors the trial court can consider in determining if the third party has overcome the presumption in favor of a natural parent and the trial court is not limited to those three factors in making its custodial determination. See In re B.H., 770 N.E.2d 287. The court must also consider the factors relating to de facto custodians, set forth in Indiana Code section 31-17-2-8.5, supra.

Our review of the record does not support a conclusion that the trial court applied an incorrect standard or that the presumption in favor of Babbs having custody of J.G. was rebutted. Galicia asserts Babbs is an unfit custodian because she smokes cigarettes in J.G.'s presence despite J.G.'s asthma and her home was found to be in an unkempt and poor condition. The trial court did not address these specific charges, but noted that while Babbs received permanent injuries in an automobile accident, the injuries do not interfere with her

ability to care for J.G. Appellant's App. at 21. Further, Babbs received a structured personal injury settlement of $750,000. She receives $200,000 from the settlement at the rate of $1,079 per month. She spent about $100,000 for her house, has $100,000 in a money market account, and spent about $100,000 on vehicles, furnishings, etc. Id. Babbs lives in the house with her son and there is also a two-bedroom apartment in the house with a separate entrance that Babbs rents to others for income. The court stated Babbs has sufficient income from rent, her money market account, and her monthly annuity payments to support herself and J.G. without working. "Babbs is willing and able to be an appropriate full time parent for [J.G.]" Id. at 21-22. The court thus found the evidence showed that Babbs is a fit parent both emotionally and in her ability to support her children financially. Id. at 20-21.

Galicia also charges Babbs acquiesced in the care of J.G. by DCS and then by him. She left Bloomington for Boston, leaving J.G. behind, and did not provide any way to contact her. DCS staff testified they did not have any contact from Babbs until February of 2004, and Babbs did not try to regain custody of J.G. until March of 2005. However, Babbs states the record reflects that she never acquiesced to custody by Galicia or had any intention of him receiving custody. Rather she believed J.G. was in the care of the DCS, and when she discovered Galicia had been awarded custody through the CHINS action, she began pursuing custody and reestablishing a relationship with J.G. The trial court found Babbs was "overwhelmed by her life in Bloomington at the time she left. Her fear of Galicia was one factor in her decision to leave, but was not the primary factor." Appellant's App. at 22. "Babbs relinquished the care of [J.G.] to the DCS by leaving town and moving to Boston in early 2003. It is not, however, clear that Babbs intended to relinquish care of [J.G.] to

Galicia." Id. The evidence of her acquiescence in Galicia's care of J.G. is in conflict.

Galicia emphasizes J.G. has developed a strong emotional bond with him. He acted as her father since birth, and as her only parent after she was abandoned by Babbs, and has visited J.G. regularly and complied with the DCS requirements for reunification. Babbs points out she also has a strong emotional bond with J.G. The trial court properly noted J.G.'s relationship with Galicia, stating J.G. is attached to Galicia and regards him as her father and he has cared for her as a father. Id. at 23. However, the court stated, even though J.G. has been in Galicia's care for most of her life, she has a mother who is willing and able to care for her. "Her relationship with Galicia is not of such a long duration as to outweigh the strong preference for placing children in the custody of their parents." Id. The court noted it is likely that losing contact with Galicia will cause J.G. unhappiness and confusion. The court ordered that Babbs should obtain professional assistance to help J.G. transition from Galicia's home to Babbs' home and to report to the court and to Galicia, in writing, the name of the therapist selected and the substance of the therapist's recommendations. Id. at 25. Further, the court noted that Galicia should continue to have contact with J.G. as recommended. Id. at 23.

The trial court specifically determined it is not in J.G.'s "best interest to be placed in the custody of Galicia." Id. The court noted Galicia concedes he is an illegal immigrant and he risks deportation because he has no legal right to remain in the United States. "His potential deportation and his inability to legally work in the United States will adversely affect J.G. if she is in Galicia's care. Galicia's tenuous legal status makes it unlikely he will ever be able to provide a stable home for J.G." Id. at 22. Further, Galicia has been convicted

of domestic battery and charged several times. Id. "Galicia's prior battery of Babbs and the pending Owen County prosecution of Galicia [for the March 2005 incident] are strong reasons not to place J.G. in his care. Even ignoring the motive that Galicia may have to influence Babbs' conduct and perhaps her testimony in the pending criminal prosecution against him by controlling J.G., placing J.G. in Galicia's custody would guarantee that the bad relationship between Babbs and Galicia will be a permanent factor of J.G.'s life." Id. at 23.

We are sympathetic to the relationship that has developed between J.G. and Galicia. Galicia is not merely a third party but the recognized de facto custodian who has cared for J.G. and acted as J.G.'s parent. Galicia dated Babbs during her pregnancy, signed a paternity affidavit at the hospital when J.G. was born believing he was J.G.'s biological father, married Babbs one month after J.G.'s birth, and lived with J.G. as a parent for most of her three and one half years. The existence of this relationship was properly noted and considered by the trial court. However, although Galicia acted as a parent, we conclude none of these factors, alone or collectively, are sufficient to overcome Babbs' presumptively superior rights to have custody of her child. The trial court's conclusion awarding custody of J.G. to Babbs because it is in the best interests of the child is correct because it appropriately considers whether the presumption in favor of Babbs having custody has been rebutted.

III. Initial Determination of Custody

Galicia complains the trial court improperly treated the final dissolution hearing as an initial custody hearing rather than a modification of custody hearing. He argues as he already had custody of J.G. pursuant to the CHINS order and the Order from the Protection Order

hearing, this later custody determination amounts to a modification of custody. As such, he asserts Babbs must demonstrate both a substantial change in circumstances and that a modification would be in J.G.'s best interests.

The difference between a custody modification and an initial custody determination is important. Hughes v. Rogusta, 830 N.E.2d 898, 900 (Ind. Ct. App. 2005). "In an initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered." Id. (citing Apter v. Ross, 781 N.E.2d 744, 758 (Ind. Ct. App. 2003), trans. denied). Where a trial court is making an initial custody determination, it is required to consider all evidence from the time of the child's birth in determining the custody arrangement that would be in the best interest of the child. Hughes, 830 N.E.2d at 902.

The "Order On Fact-Finding Hearing" of April of 2003, and the "Emergency Order" of April 2005 show that custody of J.G. was granted to Galicia on the premise that he was presumed to be her father. See Appellant's App. at 27-29. While Galicia acted as a parent, "[a] biological mother of a child born out of wedlock has sole legal custody of the child, unless a statute or court order provides otherwise…." Ind. Code § 31-14-13-1. As the de facto custodian, Galicia has not rebutted the presumption in favor of Babbs. If the presumption in favor of the natural parent is not rebutted, then custody would be with the natural parent. Galicia has not rebutted the presumption in favor of Babbs and it is in J.G.'s best interests that Babbs have custody.

Conclusion

Concluding the trial court applied the proper standard for determining custody when

there is a de facto custodian, and properly treated this as an initial determination of custody, we affirm.

Affirmed.

SULLIVAN, J., and VAIDIK, J., concurs.